Norris McLaughlin & Marcus, P.A.
ATTORNEYS AT LAW

Tax Law Alert

June 2010

Recent New Jersey Tax Court Decision Opens the Door to Potential Transfer Tax Savings on Real Property Transfers

New Jersey property owners received favorable news when a recent New Jersey Tax Court decision (Mack Cali, LP, et. seq. v. Clerk of Bergen County, et. seq., 25 *N.J. Tax* 243 (2009) ("Mack Cali")) effectively increased the potential for certain real property transfers between wholly-owned or commonly owned entities to qualify for a statutory exemption from realty transfer fees ("RTF"). For practical purposes, the New Jersey Tax Court's decision opens the door for property owners to potentially achieve the corporate benefits of personal liability protection by transferring real property to a limited liability company ("LLC") or another controlled entity, without incurring RTF. Additionally, as discussed below, the decision may have an impact in New Jersey beyond future transfers of real property between commonly owned entities.

The Case

The Mack Cali decision involved the transfer of two pieces of real estate to two single member limited liability companies. Mack Cali was the sole member of each of these entities. Mack Cali filed the deeds for the transfers with the Clerk of Bergen County and claimed an exemption from the New Jersey Realty Transfer Tax based on N.J.S.A. 46:15-10(a). That section dictates that transfers of real property for a consideration of less than $100 are exempt from RTF. The clerk returned these deeds to Mack Cali and stated the exemption was not applicable in this case. The New Jersey Division of Taxation agreed and the Tax Court action ensued.

New Jersey Exemptions from Realty Transfer Fees

Under the New Jersey Realty Transfer Fee Statute, N.J.S.A. 46:15-5(c), transfers of real property for consideration of less than $100 are exempt from RTF. Unfortunately for property owners, many past transfers have not qualified under the $100 exemption because the New Jersey Division of Taxation has, in general, interpreted the term "consideration" to include the amount of money received by the transferor, plus the balance of any underlying mortgage, plus *the value of the real property transferred (minus any mortgage balance)* to the commonly owned entity. Because of the Division of Taxation's policy of considering the underlying real property value as a portion of consideration, nearly all transfers to commonly owned entities were determined to be for consideration of $100 or more (regardless of the actual amount of money that actually changed hands and even if there was not a mortgage on the transferred real property) and, consequently, faced RTF. For example, if real property valued at $500,000 (without a mortgage) was owned by an individual under his/her name and that individual transferred the property to a wholly-owned or commonly controlled LLC for a nominal price of $10, the RTF on such a transfer would be approximately $4,175 (based on a schedule that approximates, but does not exactly equal 1% of the value of the property.)

The Mack Cali Decision Implications

The Tax Court decision has changed the likely outcome of the above example by recognizing that relevant New Jersey laws and regulations do not allow the underlying value of a transferred real property to be included when calculating consideration for purposes of RTF. Instead, the New Jersey Tax Court concluded in Mack Cali that consideration only consists of (i) the actual amount of money and the value of other things actually paid, plus (ii) the balance of any underlying mortgage. Consequently, many more real property transfers between wholly-owned commonly owned entities should qualify for the exemption from RTF.

Three main issues addressed in and raised by the New Jersey Tax Court's decision are as follows:

1. RTF should in many cases not be charged on transfers of mortgage free properties between wholly-owned or commonly owned entities.
2. An open issue exists as to whether this decision is applicable to transfers between unrelated entities.
3. While not addressed in the New Jersey Tax Court's decision, an opportunity may exist for real property owners to file refund claims for certain previously paid RTF.

Does the Tax Court's Decision Extend to Transfers between Unrelated Entities?

The New Jersey Tax Court's decision involved a real property transfer between commonly owned entities. It is unclear whether the decision is applicable to transfers of property between unrelated entities. However, in its decision, the New Jersey Tax Court uses broad language in interpreting relevant laws and does not indicate that such interpretations are only limited to transfers involving commonly owned entities. Thus, there is a strong argument that the New Jersey Tax Court's decision should apply to all real property transfers, which would further increase the amount of transactions eligible for the RTF exemption.

Refund Claims for Previously Paid RTFs?

Unaddressed by the New Jersey Tax Court's decision is whether real property owners, who have previously paid RTF on property transfers that would otherwise be exempt under the Mack Cali decision, are eligible to apply for refunds. While not absolute, it seems that a strong argument can be made that refunds should be available to previous transfers of real property between wholly-owned or commonly owned entities in which both, less than $100 was actually paid and no outstanding mortgage was attached to the transferred property. The New Jersey Tax Court's decision did not change current law, but rather, provided an interpretation and an

NJ: 721 Route 202-206 P.O. Box 5933 Bridgewater, NJ 08807-5933 • P: (908) 722-0700 • F: (908) 722-0755
NY: 875 Third Avenue, 8th Floor New York, NY 10022 • P: (212) 808-0700 • F: (212) 808-0844
PA: The Paragon Centre, Suite 300 1611 Pond Road Allentown, PA 18104-2258 • P: (610) 391-1800 • F: (610) 391-1805

www.nmmlaw.com E: info@nmmlaw.com

explanation as to how current law should be applied. If, as the New Jersey Tax Court appears to provide, the RTF exemption has been inappropriately applied in the past, then a reasonable argument is exists that RTF in some cases may have been inappropriately paid and should be subject to a refund claim.

The New Jersey Tax Court notably states outright that it was not advocating a "blanket exclusion" from RTF of any transaction between commonly controlled entities. That being said, clearly the holding in Mack Cali provides an opportunity for tax planning for real estate owners. We at NMM are pleased to further discuss your potential planning opportunities regarding this issue.

This *Tax Law Alert* was written by **Michael G. DeRose**, **Melinda Fellner Bramwit** and **Jesse P. Nash.** Michael, an Associate with the firm, focuses his practice on employee benefits. Melinda, Of Counsel to the firm, is experienced in many aspects of tax planning including corporate issues and partnership and estate tax issues. Jesse, an Associate with the firm, concentrates his practice primarily on real estate and finance law. If you have any questions regarding the information in this alert or any other related matters, please feel free to contact Michael, Melinda or Jesse, by email at **mgderose@nmmlaw.com**, **mfbramwit@nmmlaw.com**, or **jpnash@nmmlaw.com**, respectively**.**

Norris McLaughlin & Marcus Taxation Attorneys

G. Robert Marcus
grmarcus@nmmlaw.com

Robert G. Tallman
rtallman@nmmlaw.com

Victor S. Elgort
vselgort@nmmlaw.com

Kenneth D. Meskin
kdmeskin@nmmlaw.com

Dolores A. Laputka
dlaputka@nmmlaw.com

Carl G. Weisenfeld
cgweisenfeld@nmmlaw.com

John J. Eagan
jjeagan@nmmlaw.com

Robert C. Gabrielski
rcgabrielski@nmmlaw.com

Judith A. Harris
jharris@nmmlaw.com

Charles A. Bruder
cabruder@nmmlaw.com

Jill Lebowitz
jlebowitz@nmmlaw.com

Ronnie F. Hess
rhess@nmmlaw.com

Melinda Fellner Bramwit
mfbramwit@nmmlaw.com

April Scott McCann
asmccann@nmmlaw.com

R. Nicholas Nanovic
nnanovic@nmmlaw.com

Stephanie Kobal
skobal@nmmlaw.com

Cory P. Balliet
cballiet@nmmlaw.com